IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 558 OF 2003

IN

SUMMARY SUIT NO. 3142 Of 2001

Edma Cut (Bombay) Pvt.Ltd. .. Plaintiff

versus

M/s.Sharda Wirecut Technologies P.Ltd.. Defendant

...

Mr.K.G. Munshi i/b Little & Co. for the plaintiff.

Mr.Harinder Toor i/b N.I. Bakali for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 23rd March 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. This Summons for Judgement is taken out by the plaintiff in a suit filed by it for recovery of the balance due for the value of the goods sold supplied and delivered to the defendant.

3. The plaintiff sold supplied and delivered to the defendant an used machine (JAPAN) wirecut machine with stabiliser and issued invoice no.438 for Rs.10,96,700/- inclusive of packaging charges and central sales tax. After giving a credit of Rs.3,00,000/- paid as an advance by the defendant to the plaintiff, the balance due is Rs.7,96,700/-. As the balance amount was not paid, the plaintiff by Advocate's notice dated 28th July 2001 (Exhibit B to the plaint) demanded payment, but the defendant failed and neglected to pay. Hence, the plaintiff has filed this suit for recovery of the sum of Rs.7,96,700/- and interest thereon. In addition, the plaintiff has claimed interest at 18% p.a. from the date of the supply till the suit and has claimed additional central sales tax at 6% p.a. At the hearing of the Summons for Judgement, the learned counsel for the plaintiff gives up the claim of interest prior to the date of institution of the suit and the claim for additional sales tax because there is no contract to pay interest nor there is any contract to pay additional sales tax.

4. By filing an affidavit in reply, the defendant

has disputed the liability to pay even the principal sum of Rs.7,96,700/-. Learned counsel for the defendant principally raised four defences viz. i) the suit machine was defective. By a fax message dated 5th October 1992, the defendant had rejected the machine and called upon the plaintiff to take back the machine. As such, the defendant is not liable to make the payment. (ii) The defendant has made payment of Rs.3,00,000/- in two instalments viz. Rs.2 lakhs on 27.10.1997 and Rs.1 lakh on 29.8.1998. Therefore, Rs.7,96,700/- are not due. iii) the plaintiff is guilty of suppression of material facts and has come to the Court with unclean hands and therefore, the defendant is entitled to an unconditional leave to defend the suit. iv) Summons for Judgement has been taken out belatedly i.e. after lapse of 2 years from the date of filing of the plaint. Hence, defendant is entitled to an unconditional leave to defend the suit.

5. Learned counsel for the defendant relies upon the decision of the Supreme Court in Raj Duggar Vs. Ramesh Kumar Bansal reported in 1991 Supp(1) SCC 191 in which the Supreme court has held that in order to consider whether the defendant should be granted

leave to defend or not, it is to be seen whether the defence raises a real issue and not a sham one; in the sense that if the facts alleged by the defendant are established, whether there would be a good or even a plausible defence on those facts. The Supreme Court further held that rejecting the defence of the defendants merely because of its inherent implausibility or inconsistency would not be proper.

6. The learned counsel for the defendant therefore submits that the defence raised by the defendant raises real issues and is not a sham one. The defence that the machinery being defective has been rejected cannot be rejected by this Court on the ground of its inherent improbability. If at the trial, the defendant proves that the machine was rejected by it on account of it being defective, the suit would be dismissed and therefore, the defendant must be granted unconditional leave to defend the suit. The invoice shows that the used machine was sold on "as is where is condition". The plaintiff had not given any assurance about the quality of the machine or its usefulness or working condition. Learned counsel for the defendant however relies upon the delivery challan no.438 dated 29.8.1998 under

which the machinery was delivered to the defendant and invites my attention to note 1 below the invoice which reads thus:

> "Supplies will be considered as accepted if written report is not received by us within four weeks from the date of the receipt of the material at your end. Later, no claim will be accepted. Rejection, if any, returned with the details report within one month (latest) from the date of your inspection report will bear no responsibility or binding on us.

This printed condition in the standard delivery challan, in my view, was modified by the express written condition in the hand writing in the very delivery challan, which writing specifically states that the machine was delivered on "as is where is condition". Assuming however, that the printed condition was also applicable, it states that supplies would be deemed to be accepted if a report

is not made within a period of four weeks and thereafter machine is not rejected within a period of one month. Machine was delivered to the defendant on 29th August 1998. On the defendant's own pleadings, it sent a fax to the plaintiff rejecting the machine on 6th December 1998. Thus, the fax of alleged rejection was not sent within the period provided in the printed condition in the delivery challan. Therefore, even assuming the facts stated by the defendant to be true and correct, the defendant would not succeed in the defence. Furthermore, terms of the contract were reduced to writing in the invoice (Exhibit-A to the plaint) and delivery challan dated 29.8.98. The said terms clearly states that the machine was supplied on "as is where is condition". Under section 91 and 92 of the Evidence Act, no evidence can be adduced to vary the terms of the written contract. Therefore, correspondence between the parties cannot be looked into to modify the term that machinery was supplied on "as is where is condition".

7. As regards the contention that the defendant has paid Rs.3 lakhs in two instalment

viz. Rs.2,00,000/- on 27th October 1997 and Rs.1,00,000/- on 29.8.1998, the plaintiff in his invoice dated 29.8.98 has given the credit for the advance of Rs.3 lakhs. No case is made out that in addition to the sum of Rs.3,06,000/- mentioned in the invoice dated 29.8.98, any further sum was paid to the plaintiff by the defendant. Thus, this defence would have no effect on the claim of the plaintiff wherein the plaintiff has claimed only the balance amount due after giving credit of Rs.3,00,000/-.

8. Learned counsel for the defendant submits that the plaintiff is guilty of suppression of material facts and had not disclosed copy of the delivery challan and other correspondence between the parties subsequent to the delivery of the goods. He relies upon the decision of the Supreme Court in S.P.Changalvaraya Naidu Vs. Jagannath reported in 1994 S.C. 853. In that case, the Supreme court held that a person whose case is based on falsehood has no right to approach the Court. He can be thrown out at any stage of the limitation. A litigant who approaches the Court is bound to produce all documents which are relevant

to the litigation. If he withholds vital document then he would be playing fraud on the court. Learned counsel submits that by withholding the delivery challan and subsequent correspondence the plaintiff has committed a fraud on the court and therefore, the suit of the plaintiff is liable to be thrown out summarily. Form no.3 of the Appendix-A of the Code of Civil Procedure prescribes the form of the plaint to be filed in a suit for recovery of the price of the goods sold. Perusal of the said form shows that the plaintiff is required to aver that he sold and delivered the goods and is further required to state the price of the goods sold; he is required to state the amount, if any, which has been received by him and the balance amount due. He is also required to disclose the facts relating to the jurisdiction of the court and calculation, payment of the court fees. The present suit is filed for recovery of the price of the goods sold and delivered to the defendant. The plaintiff has pleaded all necessary facts and has also produced the invoices. As receipt of the goods is not disputed it was not necessary to produce the delivery challan. In any event, the original delivery challan was and is in

custody of the defendant and not the plaintiff. The machinery was defective was a defence of the defendant. Law does not require the plaintiff to disclose what is the defence of the defendant. It is for the defendant to disclose his defence and produce documents in support of his defence especially when the originals were and are in custody of the defendant. In my view, therefore, plaintiff is not guilty of suppression of the facts. The allegation that the suit is liable to be dismissed on account of suppression of facts and plaintiff coming to the Court with unclean hands is totally unjustified.

9. It is true that there has been a delay in taking out the Summons for Judgement. The suit is filed on 28th August 2001. The defendant filed an appearance on 19th October 2001. The Summons for Judgement has been taken out on 22nd May 2003 i.e. after a lapse of nearly 1 1/2 years. In Bankay Bihari G. Agarwal & ors. Vs. M/s.Bhagwanji Meghji & ors reported in 2001(1) Mh.L.J. 345, a Division Bench of this Court has held that a delay in taking out the Summons for Judgement beyond the period of six months prescribed by Rule 227 of the

High Court (OS) Rules does not automatically entitle a defendant to an unconditional leave to defend the suit but is relevant factor to be considered in conjunction with the nature of the defence while granting conditional or unconditional leave to defend the suit. Thus, unconditional leave cannot be granted to the defendant to defend the suit merely because there has been a delay in taking out the Summons for Judgement.

10. As considered earlier, none of the defences raised by the defendant is defence of any substance. As held by the Supreme court in Raj Duggal (Supra), the Court is required to see whether grant of leave would merely enable the defendant to prolong the litigation by raising untenable of and frivolous defences. The terms of the contract are clear. The machinery was supplied on "as is where is condition". Assuming that there is a condition that the defendant had a right to reject the machinery as stated in the printed condition of delivery note. The right was to be exercised within one month. The right was not exercised within one month and as such, the

defendant is bound to pay the price of the machinery.

11. In view of what is stated above, I would have ordinarily been inclined to make the Summons for Judgement absolute. However, merely as an act of mercy, I am inclined to grant conditional leave to the defendant to defend the suit. The defendant is accordingly granted conditional leave to defend the suit subject to his depositing in the Court a sum of Rs.5,00,000/- (Rupees Five lacs only) within a period of six weeks. On such deposit, the plaintiff is allowed to withdraw the said sum by furnishing security to the satisfaction of Prothonotary & Registrar (Original Side).

12. On deposit of the money, suit shall stand transferred to the list of commercial causes. The defendant to file written statement within a period of eight weeks.

D.G. KARNIK,J